

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF DEPARTMENT OF TRANSPORTATION GRIEVANCE NO. 2-2006:

JON S. WATSON, DEPARTMENT OF TRANSPORTATION,))	Case No. 2186-2006
)	
Grievant,)	
)	
vs.)	FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
)	AND PROPOSED ORDER
MONTANA DEPARTMENT OF)		
TRANSPORTATION,)	
)	
Defendant.)	

I. INTRODUCTION

Pursuant to Mont. Code Ann. § 2-18-1001(3), Jon S. Watson, grievant, an employee of the Montana Department of Transportation, filed a formal grievance on April 27, 2006. On January 12, 2007, the Board of Personnel Appeals (BOPA), through its designee, issued a preliminary decision on the grievance. Watson rejected the preliminary decision on January 18, 2007. The Board then referred the complaint to the Hearings Bureau for contested case hearing proceedings.

Pursuant to Mont. Code Ann. § 2-18-1002 and the rule governing Step 3 proceedings for Transportation grievances, Admin. R. Mont. 24.26.303(b) and (c), the Hearings Bureau appointed a Hearing Officer to act on behalf of BOPA. The Hearing Officer held the hearing October 1-3 and December 4-5, 2007. Mary Ann Sutton represented Watson (co-counsel Jeffrey A. Simkovic's motion to withdraw having been granted before hearing). Susan J. Rebeck represented the Montana Department of Transportation.

At hearing, Jon Watson, John Blacker, Matthew Strizich, James Walther, Debby Williams, Paul Gregory Jagoda, Diana Price, James Phillips, Dwane Kailey, Shane Stack, Doug Moeller, Jeffrey Ebert, Joseph Walsh, Paul Ferry, Loren Frazier, William Squires, Damian Krings, Benjamin Nunnallee, Robert Padmos and Jennifer Jensen testified under oath. The Hearing Officer admitted Exhibits B, I, K, O, R, T, Z, amended Z, X, AA-BB, HH through KK, PP, QQ, ZZ, AAA through LLL, QQQ through WWW, 12, 20-25, 22A, 27, 29, 30-36, 45, 52-53, 65, 73-82, 89-96, 106-110, 126-127, 160-161, 163-165, 168, 176, 180-184, 186, 188-192, 194, 230, 230BN, 258-262, and 275-277 into evidence. He refused Exhibits G, HH, 45 and 199 (exhibits first refused and later admitted are only mentioned as admitted). Exhibit YY was referenced in the record but never offered.

The parties filed their respective proposed decisions and post-hearing briefs and the case was submitted for decision on April 14, 2008. Having considered the evidence and the arguments and authorities, the Hearing Officer now makes the following findings of fact and conclusions of law, and submits the following proposed order for BOPA.

II. ISSUES

The determinative issue is whether the Montana Department of Transportation violated its policies in the hiring process(es) involved in this case.

III. FINDINGS OF FACT

1. The Montana Department of Transportation (MDT) is a state agency charged with the responsibility of providing the means to plan for the present and future transportation needs of the citizens of Montana, assuring that transportation remains a viable element in the private sector of the economy and providing energy-efficient and ecologically compatible transportation services with optimum efficiency, effectiveness, and economy. The public policy of Montana is that adequate, safe, and efficient transportation facilities and services of all modes are essential to the economic growth of the state and the well-being of its people and that the planning and development of those facilities and services will be coordinated by a department of transportation that has overall responsibility for balanced transportation policy and planning. Mont. Code Ann. § 2-15-2505.

2. MDT coordinates its work between its Helena Headquarters (HQ) and its five districts statewide: Billings, Butte, Glendive, Great Falls, and Missoula.

3. Duties of HQ-based engineering positions generally differ from engineering positions in the districts, because the districts are MDT's delivery arms. The districts are "where the action is," "where the rubber meets the road." District personnel perform construction administration, maintenance activities and preconstruction activities. They deal face-to-face with the communities. Like its counterparts around the state, the Missoula District (where the positions involved in this case are located) deals with all aspects of project development, from nomination of a project to completion of construction.

4. Three pertinent district positions in particular are involved in this case. The District Administrator (DA) in each district is responsible for all highway activities in that district. The DA relies on the District Engineering Services Supervisor (DESS) and the District Projects Engineer (DPE) to help with this, just as he relies on the maintenance chief and the district construction engineer. All three jobs are management positions in each district. The DESS and DPE jobs are project development, project design positions.

5. The DESS and DPE are not responsible solely for one specialized part of transportation engineering. Within their district, the DESS and the DPE are involved in all the projects, (consultant and in-house), in all areas, including design, bridge, traffic, hydraulics, environmental, right-of-way acquisition, and materials testing. They interact and support maintenance and construction activities. Because they are involved in all aspects of project

delivery, the DESS and DPE jobs require diverse skills, with emphases on communication and public speaking.

6. Districts are more directly involved with local governments (cities, towns, and counties) than is HQ. The DA, DESS and DPE in each district interact with city and county staff, attend city council and county commission meetings and attend or participate in joint meetings with both. They also interact with other state and federal agency staff, including the Forest Service, Montana Department of Environmental Quality, Montana Fish, Wildlife and Parks, the National Park Service and also the various Tribes in Montana.

7. The team of DA, DESS and DPE has to cover all these bases together (one person can only be one place at a time). The three employees also deal more directly with the public than the majority of MDT's HQ employees.

8. Jon Watson is a Professional Engineer who has worked for MDT since 1993. Before working for MDT, Watson obtained an associate's degree in surveying (June 1983), from Flathead Valley Community College, Kalispell, Montana. From June 1983 to November 1985, Watson was a surveyor for the Cadastral Surveying Department on the Flathead National Forest. In December 1990, Watson received his bachelor's degree in engineering from Montana State University, Bozeman. From March 1991 to March 1993, Watson was a Pavement Management Engineer for Yakima County Public Works, Yakima, Washington.

9. From April 5, 1993 to December 1993, Watson worked for MDT as a Civil Engineering Specialist (Position Nos. 08012 and 40082), Surfacing Design Unit. From December 1993 to November 1999, Watson was a Civil Engineering Specialist (Position No. 40082), Pavement Management and Pavement Analysis/Research sections, Materials Bureau. In April 1994, Watson obtained his Engineer in Training certification (now called an Engineering Intern). Mont. Code Ann. 37-67-101(3). Since October 1998, Watson has been and is a Professional Engineer licensed under Mont. Code Ann. § 37-67-101(3).

10. Since November 1999, MDT employed Watson in Position No. 40093, Pavement Engineer and Section Supervisor, Pavement Analysis Section, at MDT's HQ. In this position Watson has supervised up to 5 supervisors, up to 19 full-time employees, and several part-time employees, in a number of work units. At all times pertinent to his grievance, Watson has resided in Helena. The work of the Pavement Analysis Section is extremely specialized.

11. Watson has never worked in an MDT district.

12. Outside of his pavement work, Watson has very limited experience in project development and project design.

13. MDT sometimes places management and supervisory employees into vacant positions on an "acting" or "temporary" assignment, in which they may work for extended times. A "temporary" assignment for a permanent employee is entirely different from the hire of a "temporary" employee. This practice allows MDT to fill a vacant position quickly, without resort to outside competitive applications.

14. The potential mutual advantage to MDT and to the employee in the acting assignment, in addition to MDT's interest in filling positions quickly, is that both the agency and the employee find out what kind of a "fit" the new acting assignment turns out to be. If it is a good "fit," and the employee is interested in a permanent assignment to the job, his or her performance in the acting assignment is known in MDT in considering the employee for the permanent position. Conversely, the employee in the acting assignment may not be a "good fit," or may for some other reason not want the permanent assignment, preferring to revert to the former job.

15. Placing a current employee in an acting assignment opens that employee's previous position, perhaps temporarily, and can create a "ripple" effect. Because the employee in the acting assignment might ultimately return to his or her previous assignment at the conclusion of the acting assignment, temporarily filling that now vacant position with another "acting" assignment could open another job and lead to a third "acting" assignment, and so forth.

16. In October 2004, the retirement of MDT Materials Division Chief Engineer Joel Marshick was announced.

17. Loran Frazier, Missoula DA, was brought to headquarters in Helena to serve as the "Acting" Chief Engineer to replace Marshick. This left the Missoula DA position vacant.

18. Watson learned of Frazier's assignment to acting chief engineer through the MDT website and newsletter. Watson expected that there would be further changes within the Missoula District supervisory positions. Watson sent Frazier an e-mail requesting that he be considered for acting positions in the Missoula District in order to gain some experience there, expressing his desire eventually to transfer to Missoula.

19. Watson did not receive any acting positions in the Missoula Division.

20. Dwane Kailey, Missoula DESS, was assigned as acting Missoula DA, with an increase in salary. This left the Missoula DESS position, position No. 51201, vacant.

21. Shane Stack, Missoula DPE, was assigned as acting DESS. This left the Missoula DPE position, Position No. 13022, vacant.

22. Glen Cameron, an MDT employee in the Missoula District Traffic and Safety Division was assigned as acting Missoula DPE, with increased salary. Cameron did not have a Professional Engineer license, which was a requirement of this position.

23. Some months later, Watson's supervisor, Matt Strizich, told Watson that he had been considered but not selected for assignment in Missoula acting positions. Strizich recounted that Frazier had talked to him about Watson's request for acting or training positions in the Missoula District, and Strizich had told Frazier that it would be difficult, if not impossible, for Watson's section to keep functioning at a satisfactory level if Watson were reassigned at that time. When he talked to Frazier, Strizich was relatively new to the Materials Bureau, which consisted of three sections: Physical Testing, Pavement Analysis, and Geotech. Strizich knew that 2 supervisor jobs under Watson were vacant and filling them was difficult. Strizich feared that even when the positions were filled, it would take time to get the new supervisors up and

running. MDT filled one of the two supervisor positions under Watson before Stack and Cameron received their acting assignments in Missoula. MDT filled the second supervisor position under Watson in February 2005.

24. On August 11, 2005, MDT posted the Missoula DESS position for a permanent appointment. Stack, the acting DESS, and Watson were the only qualified applicants for the permanent appointment.

25. Watson had 13 years with MDT, and had held his Professional Engineer license for 6 years. His experience was discussed in more detail in Findings 8-12, above.

26. Stack had 8 years with MDT and had held his Professional Engineer license for 2 years. MDT had trained Stack for career advancement. He was assigned a 16-month intensive rotating engineer orientation program in several major MDT offices and program areas in the Engineering Construction Division, where he worked in Project Management, Transportation Planning, Right-of Way, Construction, Bridge, Survey, Traffic, Environmental, Road Design, Materials, Hydraulic and Safety. During this rotation Stack gained hands-on first person experience in each of these areas, and also gained valuable contacts in MDT.

27. Stack outscored Watson in the interviewing and testing process used by MDT. Although some of the materials used in the process involved a project on which Stack had worked (a poor selection of material for the process, as MDT admitted), the disparity in scores was not entirely the result of this poor material selection. In addition, as their demeanor and attitudes during their respective testimony at hearing reflected, Stack was more comfortable and personable in a stressful public setting.

28. The selection committee reasonably chose Stack over Watson, selecting between two qualified candidates. It would not have been unreasonable to select Watson, but there was no basis upon which Watson was clearly a substantially superior candidate.

29. As of October 5, 2005, Jon Watson knew that MDT had not selected him for the Missoula DESS position.

30. On October 19, 2005, MDT posted the Missoula DPE position for a permanent appointment. Watson was among the applicants for the permanent position.

31. Watson and Ben Nunnallee were the only qualified applicants for the permanent DPE position. The position was a lateral move for Watson; it was a promotion for Nunnallee.

32. Watson scored higher on the written test (96 v. 84 points) than Nunnallee and had a higher overall score (78.5 v. 76.5). However, Nunnallee's limited experience with MDT at the time of the hiring decision made the small gap between his scores and Watson's scores notable in Nunnallee's favor.

33. Watson did not prove, by substantial and credible evidence, that there were any irregularities in the testing and interviewing procedures that prejudiced his candidacy by favoring Nunnallee.

34. Because MDT did not select the highest scoring candidate, Watson, the selection panel prepared a justification memo to human resources. Reference checks for both applicants were conducted by Stack, who was part of the selection committee for the DPE position. Stack contacted one reference for each applicant. Both applicants received positive references.

35. Watson's seniority was not considered in the selection process for the DPE position. However, Watson did not establish, by substantial and credible evidence, that seniority was an applicable selection criterion for a non-union management position with MDT.

36. The selection committee reasonably chose Nunnallee over Watson, selecting between two qualified candidates, based upon the committee's conclusion that Nunnallee had precisely the mix of experience and ability that was needed for the position. It would not have been unreasonable to select Watson, but there was no basis upon which Watson was clearly a substantially superior candidate.

37. Watson presented a written complaint about the hiring processes for the Missoula DESS and DPE positions to MDT Human Resource Division Administrator Jennifer Jensen on approximately December 9, 2005, describing the practice involved as "discriminating" against some applicants. He did not present his complaint to Strizich, his immediate supervisor. On December 16, 2005, Jensen assigned MDT Civil Rights Bureau Chief Vicky Koch to investigate and respond to Watson's complaints. Koch interviewed Watson on December 21, 2005, and provided a response and a revised response in January 2006.

38. Watson notified Jennifer Jensen on February 9, 2006 that his concerns had not been resolved. On or about February 13, 2006, Jensen met with Watson, and provided Watson with formal grievance forms. The forms included a telephone number for seeking information. In addition, Jensen gave Watson a document that outlined the grievance procedure. No one from MDT ever discouraged Jon Watson from filing a grievance. Watson filed his formal grievance on April 27, 2006, 204 days after Watson learned of MDT's selection of Stack as the Missoula DESS, but less than 180 days after he learned of MDT's selection of Nunnallee as the Missoula DPE, referring to it as "a continuation of a grievance file [sic] in December 2005 with Vicki Koch."

39. Watson did not grieve other selection processes and did not apply for other positions as to which he offered evidence.

40. Watson did not submit any evidence of any damages that he suffered as a result of the administrative actions that he grieved.

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IV. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over this case. Although arguably Watson was not timely in filing his grievance as to the Missoula DESS selection decision, BOPA referred this entire matter for a hearing after rejection of the preliminary decision. Loose

compliance with grievance procedures within MDT as well as the potential chilling effect upon future informal internal dispute resolution procedures if delay in a formal grievance for completion of those procedures could bar the formal grievance also militates against deciding this grievance on a technical “untimely filing”, and therefore the validity of both selection processes, as well as the preceding acting assignments, is addressed.

2. Watson did not prove that MDT violated any statutes, rules, regulations or policies either in its acting assignments for the Missoula DESS and DPE positions in 2004, or in its permanent assignments for the same two positions in 2005.

3. Acting assignments can be precursors to the employee moving permanently into the position upon both application and successful competition for the permanent position. The acting assignments for DESS and DPE positions in 2004 were neither *per se* illegal or handled improperly in these instances.

4. Both of the particular positions at issue require extensive background in highway design and project construction. Both individuals selected for the permanent positions had extensive backgrounds in highway design and project construction. Watson’s career in pavement analysis, although it qualified him for the particular positions at issue, did not give him the wide range of knowledge, skills, and abilities necessary to work with other aspects of highway design and construction projects, thereby making the selected candidates at least as good prospects for the appointments as Watson.

5. A selection may be made of any qualified applicants in the final pool of candidates, absent violation of statutes, rules, regulations or policies in that selection.

6. Watson was not aggrieved in any serious matter of his employment based upon work conditions, supervision, or the result of an administrative action.

7. Watson has no property interest in or entitlement to cross training, acting or temporary appointments, or opportunities that might give him a competitive edge over other employees, absent violation of statutes, rules, regulations or policies, which he has not proved. His grievance should be denied in all respects.

V. RECOMMENDED ORDER

The Board denies and dismisses the transportation grievance of Jon S. Watson, in its entirety, for lack of proof of violations of statutes, rules, regulations or policies.

DATED this 25th day of April, 2008.

BOARD OF PERSONNEL APPEALS

By: /s/ TERRY SPEAR
TERRY SPEAR
Hearing Officer

NOTICE: Pursuant to Admin. R. Mont. 24.26.303(c), the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than May 19, 2008. This time period includes the 20 days provided for in Admin. R. Mont. 24.26.303(c), and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518

WATSON FOF.TSP